

## KASOWITZ, BENSON, TORRES &amp; FRIEDMAN LLP

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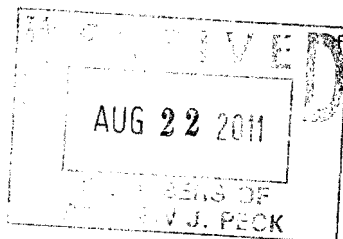
ATLANTA

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August 19, 2011

By Hand

Honorable Andrew J. Peck  
United States District Court  
Southern District of New York  
Daniel Patrick Moynihan  
United States Courthouse  
500 Pearl St.  
Courtroom 20D  
New York, New York 10007

**MEMO ENDORSED** 8/22/11

The Court will address with scheduling after paper has been filed. The filing of any motions/petitions for summary judgment is not required. However, the scheduling conference is anticipated. Any other matters in effect will be stayed by the Court, and no further action has been required or granted.

Re: Emmet & Co., Inc., et al. v. Catholic Health East, et al.,  
No. 11 Civ. 3272 (RMB) (AJP)

**SO ORDERED:**

Hon. Andrew Jay Peck  
United States Magistrate Judge

Dear Judge Peck:

We represent Emmet & Co., Inc. ("Emmet & Co.") and First Manhattan Co. ("FMC") and collectively, "Plaintiffs", plaintiffs in the above referenced action. Pursuant to Your Honor's July 7, 2011 Scheduling Order, Plaintiffs filed a First Amended Complaint on July 27, 2011, and that complaint was served on defendants on July 28, 2011. We now write to inform the Court regarding Plaintiffs' intent to file dispositive motions in this case.

As an initial matter, Plaintiffs have been informed by counsel for defendant Merrill Lynch & Co., Inc. ("ML") that Plaintiffs' First Amended Complaint, which asserts a claim for tortious interference against ML, should have instead asserted such a claim against Merrill Lynch, Pierce, Fenner & Smith Inc. ("MLPFS"). Plaintiffs intend to move the Court for leave to file a Second Amended Complaint, naming MLPFS as a defendant in place of ML. However, we understand that MLPFS is a Delaware corporation with its principal place of business in New York, and that, because plaintiff FMC is a New York partnership, joinder of MLPFS as a defendant would deprive the Court of diversity jurisdiction over this action. Therefore, in connection with the motion for leave to amend their complaint, Plaintiffs intend to move the Court to remand this action to the Supreme Court for the State of New York pursuant to 28 U.S.C. § 1447(e).

Based on initial conversations with counsel for ML, we anticipate that MLPFS and/or ML will oppose Plaintiffs' motion on various grounds -- including that the amendment substituting MLPFS as a defendant would be futile because Plaintiffs' complaint, as amended,

BY ECF

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would fail to state a claim against MLPFS pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiffs believe these arguments to be without merit.

We further intend to move on behalf of Plaintiffs for summary judgment as to liability on Plaintiffs' breach of contract claim against defendant Catholic Health East ("CHE"). Plaintiffs' position is that CHE's conduct -- improperly redeeming Plaintiffs' bonds -- indisputably breached the governing Indentures, and that the only determination that should remain for the Court is damages.<sup>1</sup> We also understand that CHE intends to move to dismiss this claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The parties have stipulated that Defendants' time to respond to the First Amended Complaint shall be extended to September 2, 2011, and, on or before that date, in accordance with Rule 2A of Judge Berman's Individual Practices, Plaintiffs intend to send a letter to the Court requesting a pre-motion conference prior to moving for leave to file a Second Amended Complaint and for summary judgment as to liability on Plaintiffs' breach of contract claim against CHE. Plaintiffs will seek a briefing schedule pursuant to which Plaintiffs will have 20 days after the pre-motion conference within which to bring the motion for leave to file a Second Amended Complaint; Defendants will have 30 days within which to file their opposition brief(s); and Plaintiffs' reply will be due 20 days thereafter. We will further propose that Plaintiffs' motion for summary judgment on the breach of contract claim and CHE's motion to dismiss should be deferred until after the Court decides whether to allow joinder of MLPFS (and thus remand the entire case to state court), or alternatively, that Plaintiffs' motion for summary judgment and CHE's motion be briefed on the same schedule as Plaintiffs' motion to amend.

Please let us know if you have any questions.

Respectfully Submitted,

  
Aaron H. Marks

cc: Richard Schwed, Esq. (via e-mail)  
Luke A. Connelly, Esq. (via e-mail)

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<sup>1</sup> Because the Indentures are unambiguous, no extraneous evidence is required to prove CHE's liability under the Indentures, and pre-discovery summary judgment is appropriate. See *Marathon Projects Ltd. v. Creative Designs Int'l, Ltd.*, No. 10 CV 2396 (RPP), 2011 U.S. Dist. LEXIS 27079, \*11 (S.D.N.Y. Mar. 16, 2011) ("Where the contract is unambiguous on its face, it should be construed as a matter of law and summary judgment is appropriate."); *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1210 (2d Cir. 2002) ("It is axiomatic that where the language of a contract is unambiguous, the parties' intent is determined within the four corners of the contract, without reference to external evidence.").

# ECF TRANSCRIPTION SHEET



**ANDREW J. PECK  
UNITED STATES MAGISTRATE JUDGE  
UNITED STATES DISTRICT COURT**

Southern District of New York  
United States Courthouse  
500 Pearl Street, Room 1370  
New York, N.Y. 10007-1312

Fax No.: (212) 805-7933  
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**Dated: August 22, 2011**

**Total Number of Pages: 3**

## **TRANSCRIPTION OF MEMO ENDORSED ORDER**

The Court will address motion scheduling only after Judge Berman has approved the filing of any motions (unless Judge Berman sets the motion schedule). However, the scheduling order re completion of discovery, etc. remains in effect unless stayed by the Court, and so far no stay has been requested or granted.

Copies by ECF to: All Counsel  
Judge Richard M. Berman